

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

64 M.S.P.R. 304

Docket Number DA-0752-94-0078-I-1

DEBRA A. McDAVID, Appellant,

v.

DEPARTMENT OF LABOR, Agency.

Date: September 21, 1994

David S. Jones, Esquire, and Steven H. Phelps, Esquire, Dallas, Texas, for the appellant.

William E. Everheart, Esquire, Terry Goltz Greenberg, Esquire, and Robin S. Horning, Esquire, Dallas, Texas, For the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The agency petitions for review and the appellant cross petitions for review of the initial decision, issued on February 24, 1994, that found that the agency proved its charge of insubordinate behavior by the preponderance of the evidence, and mitigated the appellant's removal from the position of Safety Engineer to a 60- day suspension. For the reasons set forth below, the Board finds that the agency's petition was timely filed. After full consideration, however, the Board DENIES the agency's petition for review and the appellant's cross petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115.

The agency petition for review was timely filed.

The initial decision in the subject case informed the parties that the last day to file a petition for review with the Board was March 31, 1994. Initial Appeal File, Tab 37 (Initial Decision at 22). The agency filed its petition by Federal Express. The Recipient's Copy of the Federal Express Airbill accompanying the petition has the typed date of "3/31/94" lined through and the handwritten date of "4/1/94" inserted. Petition for Review File (PfRF), Tab 1.

The Clerk of the Board issued a letter affording the agency an opportunity to show good cause for the untimely filing. PfRF, Tab 2. In response, the agency argued that its petition was timely filed. In an affidavit accompanying the response, an agency Legal

Clerk stated that she placed the petition for review in the Federal Express box before the posted last pick-up time on March 31. Attached to the agency's submission is the Sender's Copy of the Airbill, containing an unaltered date of March 31. PfRF, Tab 3.

The Board's current regulations provide that the date of filing by commercial overnight delivery "is the date the document was delivered to the commercial overnight delivery service." 5 C.F.R. § 1201.4(l) (1994). Prior Board regulations referenced only filing by personal delivery, facsimile, and mail. See generally 5 C.F.R. Part 1201 (1993).¹ In the Federal Register notice of the change in the Board's regulations to include commercial overnight delivery as a means of filing, the Board stated that the new rule "gives comparable treatment to filing by mail and filing by commercial overnight delivery." 58 Fed. Reg. 36345 (July 7, 1993).

The date of filing of a mailed submission ordinarily is the postmark; a party may establish otherwise, however, by presenting credible, unrebutted evidence in the form of an affidavit or sworn statement establishing that, despite a postmark date appearing to indicate that a submission was filed beyond the deadline, the pleading was actually placed in the Postal Service mailstream by the filing deadline, and thus was timely filed. *Raphel v. Department of the Army*, 50 M.S.P.R. 614, 616-618 (1991). To give comparable treatment to filing by mail and commercial overnight delivery, the Board extends the *Raphel* rule to filing by commercial overnight delivery. Thus, a party may establish timely filing by commercial overnight delivery by showing that, despite a date affixed by a delivery service appearing to indicate that a submission was filed beyond the deadline, the pleading was timely placed in the particular delivery service's pick-up box and that it should have been picked up by the delivery service by the filing deadline in the normal course of business.

Here, the agency submitted a credible, unrebutted affidavit stating that a Legal Clerk placed the petition for review in the Federal Express box before the posted last pick-up time on March 31. Accordingly, the Board finds that the petition was timely filed, and it has been fully considered.

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 60-day suspension. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of

¹ Prior to the regulatory change, Board case law considered filing by commercial overnight delivery to be filing by personal delivery. Because, however, the previous practice of the Clerk of the Board was to consider pleadings filed by overnight delivery as filed on the date that they were deposited with the private express company, the Board waived the filing deadline for a submission received after the filing deadline, but deposited with the private express company by the deadline. See *Ally v. Department of the Navy*, 58 M.S.P.R. 680, 683 (1993).

Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex,

national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.